



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Merrick Engineering, Inc.

**File:** B-238706.3

**Date:** August 16, 1990

Charles E. Raley, Esq., Israel and Raley, for the protester.  
Melvin N. Hatcher, Esq., Department of Energy, for the  
agency.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office  
of the General Counsel, GAO, participated in the preparation  
of the decision.

### DIGEST

Protest that contract improperly was awarded on the basis of  
a proposal that took exception to material terms of request  
for proposals issued by government prime contractor is  
denied where, even if some technical deficiency in the award  
process occurred, the protester was not prejudiced by the  
deficiency.

### DECISION

Merrick Engineering, Inc. protests the award of a contract  
to Hobart Brothers Company/Advanced Welding, Inc. (Hobart),  
under request for proposals (RFP) No. 110605, issued by  
Battelle Memorial Institute for an automatic plasma arc  
welding system. Battelle, a government prime contractor,  
manages, operates, and maintains the Pacific Northwest  
Laboratories at Richland, Washington, on behalf of the  
Department of Energy. Merrick contends that the contract  
award to Hobart was improper because the awardee submitted a  
proposal that took exception to material terms of the RFP.

We deny the protest.

Federal procurement statutes and regulations do not apply  
per se to a management contractor such as Battelle; such a  
prime contractor must conduct procurements according to the  
terms of its contract with the agency and its own agency-  
approved procedures. Our review is limited to determining  
whether the procurement conforms to the "federal norm,"  
i.e., the policy objectives in the federal statutes and

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regulations. Merrick Eng'g, Inc., B-238706.2, June 14, 1990, 90-1 CPD ¶ 564.

In this case, the RFP was issued on January 12, 1990, requesting proposals for the plasma arc welding system on a brand name or equal basis, specifically for the "Merrick Engineering, Inc., Plasmafix 50E or equal." Award was to be made on the basis of the most advantageous proposal, price and other factors considered. Battelle received three proposals for the brand-name product by the January 26 proposal due date. Merrick's price (\$18,590) was substantially higher than Hobart's price (\$13,029). After an affirmative determination of Hobart's responsibility, Battelle orally awarded the contract to Hobart on February 16, followed by written confirmation on February 20.<sup>1/</sup>

Merrick contends that Battelle should have rejected Hobart's proposal as "nonresponsive"<sup>2/</sup> because, according to the protester, Hobart's proposal took exception to material terms of the RFP with respect to time of delivery, design, payment, warranty, termination, resolution of disputes, and passage of title.

The RFP incorporated Battelle's "Fixed Price General Provisions form A-287 (R1)," a document containing pertinent

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<sup>1/</sup> On February 23, Merrick filed an initial protest with our Office alleging that Battelle improperly awarded the contract to Hobart because the awardee failed to certify that it was either a manufacturer or a regular dealer of the required item under the RFP's Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1988), certification provision. That issue was decided in Merrick Eng'g, Inc., B-238706.2, supra, where we denied in part and dismissed in part Merrick's protest. Merrick filed the current protest on April 16, based on information about Hobart's offer which Merrick states was first revealed in the agency's report on its original protest.

<sup>2/</sup> The solicitation here is clearly identified as a "REQUEST FOR PROPOSAL CONTEMPLATING NEGOTIATIONS PRIOR TO AWARD." Therefore, Merrick's reference to Hobart's proposal as "nonresponsive" is inaccurate, since the concept of responsiveness is not applicable to negotiated procurements. Gardy McGrath Int'l, Inc., B-231913, Sept. 29, 1988, 88-2 CPD ¶ 323, aff'd, Gardy McGrath Int'l, Inc.--Recon., B-231913.2, Dec. 15, 1988, 88-2 CPD ¶ 595. We interpret Merrick's protest as contending that Hobart's proposal was nonconforming to certain material terms of the RFP.

Federal Acquisition Regulation (FAR) clauses, and standard terms and conditions applicable to the procurement. As relevant to this protest, the RFP required delivery by February 27, 1990; included specifications for the required welding system; contained FAR § 52.232-1, providing for payment upon the contractor's submission of an invoice; required the contractor to expressly warrant the welding system for 365 days after acceptance; contained FAR § 52.249-2, the standard "Termination for Convenience" clause; required that disputes relating to the contract be resolved in the appropriate court within the State of Washington; and contained FAR § 52.246-16, the standard "Responsibility for Supplies" clause, requiring that title to supplies pass directly to the government upon acceptance.

Along with its proposal, Hobart submitted the signed RFP cover sheet which contained the February 27 delivery date, a description of the welding system offered, and Hobart's total price. Rather than submitting Battelle's form A-287, however, Hobart substituted its own "Standard Terms and Conditions of Sale" (T&C) form containing terms different from those in form A-287. With respect to delivery, for example, Hobart's T&C stated that "shipment and delivery dates are quoted in good faith and are approximate," and its proposal indicated that shipment would occur within "approximately 8-10 weeks." Regarding design, Hobart's T&C included an "UPDATING OF MODELS" provision that reserved to Hobart the right to change the design and specifications of the products ordered, and to ship the modified products without prior notice. Additionally, Hobart's T&C called for payment 30 days from the date of shipment; contained a warranty effective for "one (1) year following date of shipment"; specified charges to be incurred by the buyer in the event of termination; stipulated that the rights of the parties shall be governed by Ohio state law; and provided that Hobart would retain title to the products until "all of the Seller's claims arising out of its business relations with Buyer have been finally settled."

Following a telephone conversation with agency officials, by letter dated February 14, Hobart informed the agency that it expected to deliver the required equipment within 6 weeks; that its offer included a water-cooled torch as required by the RFP; and reiterated that Hobart would warrant the equipment it offered against manufacturer's defects for 1 year from date of shipment. Accompanying Hobart's letter was a completed "Representations and Certifications" form consisting of various standard self-certification provisions that Hobart apparently had failed to submit with its proposal.

Merrick argues that award to Hobart was improper because by substituting its T&C for Battelle's form A-287, Hobart took exception to material terms of the RFP, rendering its proposal unacceptable. Merrick further argues that, as shown by Hobart's February 14 letter, Hobart improperly was given an opportunity to make its proposal acceptable after the closing date for receipt of proposals.

Prejudice is an essential element of a viable protest, and where no prejudice is shown, or is otherwise evident, our Office will not disturb an award, even if some technical deficiency in the award process arguably may have occurred. American Mutual Protective Bureau, Inc., B-229967, Jan. 22, 1988, 88-1 CPD ¶ 65. Here, even assuming that Battelle improperly gave only Hobart an opportunity to revise the nonconforming terms in its initial proposal, and that by accepting Hobart's proposal Battelle waived certain material terms of the RFP, as the protester alleges, the record does not show that Merrick was prejudiced as a result.

It is undisputed that both Merrick and Hobart offered the Plasmafix 50E welding system required by the RFP, and that Merrick's price was significantly higher than Hobart's. It is also undisputed that neither Merrick nor Hobart submitted form A-287 with its proposal, both offerors instead substituting their own standard forms with terms and conditions that differed from material terms of the RFP. In this regard, we note that Merrick's own T&C contained different terms from those in form A-287 with respect to delivery, price, payment, warranties, and choice of law.<sup>3/</sup>

Under these circumstances, Merrick cannot reasonably argue that it would have received award had Battelle not improperly allowed Hobart to revise its initial proposal, since Merrick's own offer took exception to various material provisions of the RFP. In addition, Merrick's price was approximately 43 percent higher than Hobart's for the same item. There simply is no indication that Merrick would have lowered its price enough to displace Hobart as the lowest priced offeror had it, like Hobart, been given an opportunity to delete the nonconforming terms from the standard form submitted with its offer.

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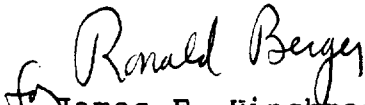
<sup>3/</sup> Merrick's T&C provided that it would use "its best efforts to fill orders on time"; stated that its prices are subject to change without notice and are not binding on Merrick; required payment within 30 days from the date of Merrick's invoice; provided a warranty for "one year from date of delivery"; and required that disputes be decided according to the laws of Tennessee.

Also, given that Merrick itself took exception to various material provisions in the RFP such as delivery and price, it appears either that Merrick prepared its offer on the assumption that the provisions in the RFP to which it took exception would be relaxed, or that the discrepancies in the standard terms were not a factor in how Merrick calculated its price. As a result, there is no reason to conclude that Merrick's high price would have changed had Merrick been advised that certain terms of the RFP would be relaxed.

DataVault Corp.--Request for Recon., B-223937.3, Jan. 20, 1987, 87-1 CPD ¶ 69, aff'g DataVault Corp., B-223937; B-223937.2, Nov. 20, 1986, 86-2 CPD ¶ 594.

Since we fail to see how Merrick was competitively prejudiced by Battelle's treatment of Hobart's offer, we see no basis to disturb the award to Hobart.

The protest is denied. Since we find the protest without merit, we also deny Merrick's claim for proposal preparation and protest costs. Fischer Marine Repair Corp., B-228297, Nov. 20, 1987, 87-2 CPD ¶ 497.

  
James F. Hinchman  
General Counsel